**MUDARIANG STEEL MILLS SDN BHD & ORS**

**v.**

**KWONG YIK BANK BHD & ORS AND ANOTHER SUIT**

HIGH COURT MALAYA, KUALA LUMPUR
SELVENTHIRANATHAN J
[SUITS NOS: D1-22-1609 OF 1989 & D4-22-728 OF 1990]
21 JULY 1998

***CIVIL PROCEDURE:*** *Costs - Security for costs - Application by defendant - Merits of plaintiff's case - Whether sufficient to resist application*

The senior assistant registrar had dismissed the 1st defendant's application for the 1st, 2nd and 3rd plaintiffs to furnish security for costs. Hence, the instant appeal by the 1st defendant.

The issue before the court was whether the 1st plaintiff could rely on the case of *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (In liquidation) v. Bank Bumiputra (M) Bhd & Ors* to contend that it had a meritorious case.

**Held:**

**[1]** The case of *Kimlin* was distinguishable on the facts as the borrower company therein was in liquidation which brought s. 223 of the Companies Act 1965 into play. The plaintiff here was not in liquidation and as such s. 223 could not be invoked.

**[1a]** The 1st plaintiff could not rely on *Kimlin* to contend that it had a meritorious case, particularly in the context of a glaring absence of any affidavit evidence setting out the merits of its case to resist the 1st defendant's application having regard to the status and financial situation of the first three plaintiffs and the costs incurred thus far as well as the costs becoming payable after the trial of the two consolidated actions herein.

**[1b]** Further, this application was sought by the 1st defendant and not the 2nd defendant, the receiver and manager, whose action was sought to be impugned.

*[Appeal allowed; decision of SAR set aside; order in terms of application.]*

**Case(s) referred to:**
*Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (In liquidation) v. Bank Bumiputra (M) Bhd & Ors [1997] 3 CLJ 274* ***(dist)***

**Legislation referred to:**
Companies Act 1965, s. 223

*For the plaintiffs - Lock Wan Ling; M/s Lim Kian Leong & Co*
*For the 1st defendant/appellant - Lim Chee Wee; M/s Skrine & Co*

*Reported by Usha Thiagarajah*

## JUDGMENT

**Selventhiranathan J:**

Having regard to the submissions made, I am of the view that the present case is distinguishable on the facts from *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (In liquidation) v. Bank Bumiputra (M) Bhd & Ors* [1997] 3 CLJ 274; [1997] 2 MLJ 805. The first plaintiff here is in receivership whereas in *Kimlin* the borrower company was in liquidation which brought into play s. 223 of the Companies Act 1965 ('s. 223'). As Edgar Joseph Jr FCJ, speaking for the Supreme Court, stated at p. 826 in the report of *Kimlin*:

> It follows that in the present case, with the advent of liquidation, any sale by the receivers and managers of the lands pursuant to the debenture would be a purported sale **of property which belonged to the borrower company**, and so **would** require the approval of the court under s. 223 of the Act. (Emphasis added.)

Since the first plaintiff was not in liquidation in the present case, s. 223 cannot be invoked to question the disposition of the first plaintiff's property by the receiver and manager. In fact, the first plaintiff has recognised this in that there is no challenge of the disposition on this ground as the pleadings presently stand and neither is there any application to amend the pleadings despite the trial of this action being set down from 11 to 14 and 18 August 1998.

In the circumstances, the court can only assume that the first plaintiff does not wish to question the disposition of the property concerned on the ground that the receiver and manager did not obtain the order of the court for such sale, if it was thought that such order was mandatory under the National Land Code 1965. In fact, the authority of the receiver and manager of the first plaintiff to dispose of the property in the *Kimlin* context has not been raised at all in the pleadings as they stand. The disposition of the property in the present case is only questioned on the bases of the alleged improper appointment of the receiver and manager, the non-notification of the disposal of the property and the below-market price obtained upon the disposal, and

not on the basis of the receiver and manager not having applied to court to obtain leave to dispose of the same.

On this score, this is what learned judge had to say in *Kimlin* at pp. 815-816 of the report of that case:

> At the outset, we should like to point out that the prayer in the application by the receivers and managers 'for leave to sell the lands' was not appropriate since if they were correct in their contention that the debenture did confer authority on them to sell the charged lands and to give a valid and registrable title to a purchaser, no leave would have been required. If, on the other hand, the debenture did not confer upon them the requisite authority to sell the lands, no leave could be given. It was because the receivers and managers had entertained some doubt about their authority under the debenture to sell the lands that the appropriate prayer for them to have inserted would have been for a declaration as to entitlement to sell the lands without resorting to proceedings under the Code to obtain a judicial sale, and to give valid and registrable title to the purchaser.
>
> Having said that, we must add that this point about the form of the prayer was not taken either in the court below or before us, and the appeal was argued on the basis of the appropriate prayers. In these circumstances, we consider that this appeal should be decided on the same basis and so we need say nothing more about this point.

Similarly, my decision in the present case is based on the prayers sought by the first plaintiff in the pleadings and as they stand the first plaintiff cannot place reliance on *Kimlin* to contend that it has a meritorius case, particularly in the context of a glaring absence of any affidavit evidence setting out the merit of its case to resist the first defendant's application in encl. (53) to be provided with security for its costs, having regard to the status and financial situation of the first three plaintiffs and the costs incurred thus far as well as the costs becoming payable after the trial of these two consolidated actions. Again, the application for such security is sought by the first defendant and not by the second defendant, the receiver and manager, whose action is sought to be impugned.

Before leaving *Kimlin*, I wish to emphasise that that case has to be read within its factual matrix in that the provisions for a judicial sale of property under the National Land Code 1965 are, in my view, to be triggered off when the company in question is in the process of being wound up by the court under s. 223 and not before, as that section itself recognises the disposition of the property of a company without any order of court *de hors* proceedings for the commencement of the winding up of a company. It is in this context that the issue for decision in *Kimlin* as posed at pp. 815-816 of the report of that

case must be read, to do justice to the reasoning of the Supreme Court in that case, as conveyed in the words of the eminent judge who wrote the judgment.

In the circumstances, the appeal of the first defendant in encl. (65) is allowed with costs, the decision of the senior assistant registrar on encl. (53) is accordingly set aside and an order is made in terms of encl. (53) for the first, second and third plaintiffs to furnish the said security for costs in the sum of RM200,000 by 31 July 1998, having regard to the time frame set for the trial of these two consolidated actions.

Order accordingly.